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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 1022.

THE UNITED STATES, APPELLANT,

vs.

JOHN C. COOPER.

APPEAL FROM THE COURT OF CLAIMS.

FILED SEPTEMBER 27, 1886.

SUPREME COURT OF THE UNITED STATES.

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THE UNITED STATES, APPELLANT,

vs.

JOHN C. COOPER.

APPEAL FROM THE COURT OF CLAIMS.

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1 In the Court of Claims. December term, 1883.

JOHN C. COOPER
vs.
THE UNITED STATES. } No. 14466.

I.—*Petition.*—*Filed October* 9, 1884.—*J. R.*

To the honorable Court of Claims:

Your petitioner, John C. Cooper, respectfully represents, that he is a citizen of the United States and a resident of Memphis, Shelby County, Tennessee; that he was, during the month of June, 1864, the owner of the following described real estate: Lots 25 and 36—22 59/100 acres, Wm. Cooper's subdivision, Shelby Co., Tennessee; that in June, 1864, said real estate was sold by the U. S. direct tax commissioners for the State of Tennessee under an act of Congress approved June 7, 1862, entitled "An act for the collection of direct taxes in certain insurrectionary districts," &c., and sold for the sum of $397.95 in excess of the tax, penalty, and costs due thereon; that in August, 1882, your petitioner presented to the Secretary of the U. S. Treasury a claim for the payment to him of said surplus, under the act of August 5, 1861, which said claim was disallowed on or about the 4th of April, 1884. Petitioner is advised that said decision is not in accordance with law and is a denial of justice.

His said claim has not been assigned or transferred, and the U.
2 S. is justly indebted to him in the amount of the aforesaid surplus proceeds of the said tax sale. Wherefore he makes application to the Court of Claims to hear and determine his case, and prays for all proper relief that he may be entitled to in the premises. And he will ever pray, &c.

JNO. C. COOPER.

STATE OF TENNESSEE,
County of Shelby:

Personally came before me, the undersigned notary public in and for said county and State, John C. Cooper, with whom I am personally acquainted, who makes oath in due form of law that the facts set forth in the foregoing petition are true, to the best of his knowledge and belief.

Given under my hand and seal this Sept. 19th, 1884.

[SEAL.] A. M. LAMBETH, JR.,
Notary Public.

GILBERT MOYERS,
Att'y for Claimant.

3 II.—*General traverse.*—*Filed Oct.* 21, 1884.

And now comes the Attorney-General, on behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given

encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

THOMAS SIMONS,
Assistant Attorney-General.

4 III.—*Findings of fact.*—*Filed April* 12, 1886.

This case having been heard by the Court of Claims, the court upon the evidence find—

I.

The tract of land described in the petition is situated in the county of Shelby, in the State of Tennessee, described as lots twenty-five (25) and thirty-six (36), William Cooper's subdivision, twenty-three (23) acres, assessed to J. C. Cooper in 1860, fourteenth civil district (country), was sold for direct taxes the 25th day of June, 1864, as the property of J. C. Cooper, the owner, by the tax commissioners appointed and duly qualified under act of Congress approved August 5th, 1861, and acts amendatory thereof.

II.

At such sale said tract was sold to Alfred Vezin for the sum of four hundred and twenty-five ($425) dollars.

III.

The total amount of charges against said tract were $33.55, leaving a balance remaining as surplus of $391.45.

IV.

Claimant sold the said tract about 1865 subject to the tax title, and in 1882 he released and quit-claimed to the Government and those
5 claiming under it all his interest in said tract to secure the Government against a second payment of the surplus now in question.

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court, in accordance with the decision in the case of Henrietta M. Paynter, finds, as conclusion of law, that the claimant recover the sum of $391.45.

6 IV.—*Final judgment.*

At a Court of Claims held at the city of Washington, D. C., on the 12th day of April, A. D. 1886, judgment was ordered to be entered up as follows:

The court on due consideration of the premises find for the claimant and do order, adjudge, and decree that the said John C. Cooper do have and recover of and from the United States the sum of three hundred and ninety one $\frac{45}{100}$ dollars ($391.45).

7 V.—*Application for and allowance of appeal.*

From the judgment rendered in the above-entitled cause on the 12th day of April, 1886, in favor of claimant, the defendants, by their Attorney-General, on the 10th day of July, 1886, make application for, and give notice of, an appeal to the Supreme Court of the United States.

ROBERT A. HOWARD,
Ass't Attorney-General,
By H. J. M.

Filed July 10, 1886.

AT. CHAMBERS.

Allowed July 10, 1886.

WILLIAM A. RICHARDSON,
Chief Justice.

8 In the Court of Claims.

VI.

JOHN C. COOPER
vs.
THE UNITED STATES. } No. 14466.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court, and the conclusion of law thereon; of the final judgment of the court, of the application of the defendants for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington this 16th day of September, 1886.

[SEAL.] JOHN RANDOLPH,
Ass't Clerk, Court of Claims.

(Indorsement on cover:) No. 1022. The United States, appellant, vs. John C. Cooper. Court of Claims. Filed September 27, 1886.

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Office Supreme Court U. S.
FILED.
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JAMES H. McKENNEY,
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1886.

THE UNITED STATES, APPELLANTS,
vs.
JOHN C. COOPER, APPELLEE. } No. 1022.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1886.

THE UNITED STATES, APPELLANTS,
vs.
JOHN C. COOPER, APPELLEE. } No. 1022.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

Statement.

The appellee, Cooper, on the 9th October, 1884, filed his petition in the Court of Claims, alleging that he was entitled to recover certain surplus proceeds in the Treasury of the United States, arising from the sale of real estate therein described, by the direct-tax commissioners of the State of Tennessee, under the acts of Congress approved 5th August, 1861 (12 Stat. L., 292), and 7th June, 1862 (12 Stat. L., 422). The real estate was purchased at the tax sale by Alfred Vezin. Cooper, however, continued to hold possession of the realty, and, in 1865, sold and

conveyed the same for a valuable consideration to another than Vezin.

On 25th June, 1864, the real estate was sold to Alfred Vezin by the direct-tax commissioners as the property of John C. Cooper.

About 1865, John C. Cooper sold and conveyed the same property for a valuable consideration to some person whose name is not given.

On 13th of November, 1882, seventeen years after he had sold and conveyed the real estate to another person, Cooper quitclaimed to the Government for the purpose of this claim, which was then pending in the Treasury Department, where it was subsequently rejected. This substantially states the case as it was tried in the Court of Claims. The ruling of the court is announced to be in accordance with the *Paynter Case* (21 C. Cls. R., 221.)

Quite a large number of cases in which the same question is presented are now pending in the Court of Claims and before the Treasury Department.

Assignment of Errors.

The appellants hereby assign the following errors in the rulings and judgment of the Court of Claims:

1. Error in the conclusion of law upon the findings of fact.

2. Error in the conclusion of law upon the findings of fact, in accordance with the decision of Henrietta M. Paynter's Case.

3. Error in rendering final judgment against the United States upon the findings of fact made by said court, for the sum of $391.45.

The claim of Cooper was rejected in the Treasury Department, and he proceeded to file his petition in the Court of Claims.

> The position of the Treasury Department in regard to these claims has been that it was the purpose and intent of Congress to pay the money to the owner in compensation for the loss of his lands incurred through the tax sale, and that it should not be paid to him unless he had in fact lost them, and that he has no legal right to it, unless he was dispossessed by the tax sale, or bought in the tax title.

It appears that Cooper, the original owner, remained in possession of the land after the tax sale, and sold the same to another than Vezin, the holder of tax-sale certificate, for a valuable consideration.

A similar state of facts existed in the Paynter case.

In the case of D. L. Crenshaw, claimant for surplus proceeds, Hon. Charles J. Folger, Secretary of the Treasury, in a letter dated April 11, 1884, said:

> Inasmuch as the principal object of the direct-tax laws is to collect the tax from delinquent owners of land by a transfer of the title and possession thereof from the owners to the purchasers at the sales, such delinquent owners, or their legal representatives, cannot in any case be entitled to the surplus proceeds of a sale if they remain forcibly in the possession of the land sold, or unless they procure an assignment of the direct-tax title by the payment of a valuable consideration therefor to the purchaser, his heirs, or assigns (Int. Rev. Record, vol. 30, p. 125).

The findings of fact and conclusion of law in the case at bar are as follows:

III.—*Findings of fact.*—*Filed April* 12, 1886.

This case having been heard by the Court of Claims, the court upon the evidence find—

I.

The tract of land described in the petition is situated in the county of Shelby, in the State of Tennessee, described as lots twenty-five (25) and thirty-six (36), William Cooper's subdivision, twenty-three (23) acres, assessed to J. C. Cooper in 1860, fourteenth civil district (country), was sold for direct taxes the 25th day of June, 1864, as the property of J. C. Cooper, the owner, by the tax commissioners appointed and duly qualified under act of Congress approved August 5, 1861, and acts amendatory thereof.

II.

At such sale said tract was sold to Alfred Vezin for the sum of four hundred and twenty-five ($425) dollars.

III.

The total amount of charges against said tract were $33,55, leaving a balance remaining as surplus of $391.45.

IV.

Claimant sold the said tract about 1865, subject to the tax title, and in 1882 he released and quit-claimed to the Government, and those claiming under it, all his interest in said tract, to secure the Government against a second payment of the surplus now in question.

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court, in accordance with the decision in the case of Henrietta M. Paynter, finds, as conclusion of law, that the claimant recover the sum of $391.45.

IV.—*Final judgment.*

At a Court of Claims held at the city of Washington, D. C., on the 12th day of April, A. D. 1886, judgment was ordered to be entered up as follows:

The court on due consideration of the premises find for the claimant, and do order, adjudge, and decree that the said John C. Cooper do have and recover of and from the United States the sum of three hundred and ninety-one $\frac{45}{100}$ dollars ($391.45).

Inasmuch as the conclusion of law in this case is in accordance with the ruling in the case of Henrietta M. Paynter, it may be well for the information and convenience of the court to insert the findings of fact and opinion of the Court of Claims in that case. They are as follows:

Court of Claims, No. 14376. Henrietta M. Paynter, Henry H. Paynter, her husband, and C. W. Paynter, their only child, *v.* The United States.

Findings of fact.

This case having been heard before the Court of Claims, the court, from the evidence, finds the facts to be as follows:

I.

Certain real estate, known as part country lot 520, Auction street, one acre, situated in Memphis, Tenn., was, June 25, 1864, sold by the direct-tax commis-

sioners in Tennessee for non-payment to the United States of direct taxes thereon, and was sold and struck off to William J. Smith and Fielding Hurst for the sum of $300. The charges against the property amounted to $25.49, leaving a balance as surplus of $274.51.

II.

At the time of the sale, and at the time of bringing this action, Henrietta M. Paynter was the owner of a life interest in the property, with remainder to her children, and in the event that she died without children, then to her husband. C. W. Paynter, claimant herein, is her only child, and Henry H. Paynter, also a claimant herein, is her husband.

III.

Claimants never bought in the tax title of said Smith and Hurst, and never quit possession of said real estate, and have not released title to the Government, but remained in possession of the property until Henrietta M. Paynter made a conveyance thereof in some form to one Walt.

Conclusion of law.

From the foregoing findings of fact the court decides, as conclusion of law, that the claimants are entitled to recover the the sum of $274.51.

DAVIS, *J.*, delivered the opinion of the court:

This is an action to recover the surplus proceeds of real estate situated in Memphis and sold for direct taxes in 1864. It appears that after the sale the claimant did not surrender possession of the premises; she was not ousted, nor, so far as is shown, was

any step taken by either the Goveanment or the purchasers to eject her. At a later day she made some kind of conveyance of the property to a third party.

The nature of this conveyance and the amount of consideration do not appear. The claim was presented to the Treasury and rejected upon the authority of a ruling by the Secretary in another case, wherein he held:

"Inasmuch as the principal object of the direct-tax laws is to collect the tax from delinquent owners of land by a transfer of the title and possession thereof from the owners to the purchasers at the sales, such delinquent owners, or their legal representatives, cannot in any case be entitled to the surplus proceeds of a sale if they remain forcibly in the possession of the land sold, or unless they procure an assignment of the direct-tax title by the payment of a valuable consideration therefor to the purchaser, his heirs, or assigns" (Int. Rev. Record, vol. 30, p. 125).

The Secretary, it will be noticed, bases his decision upon equitable reasons, and upon a case wherein possession was forcibly retained after the sale. We are not prepared to express an opinion as to the legal result should such a case be presented to us. The Paynter claim, although refused at the Treasury upon the authority of this decision of the Secretary, does not appear to fall within its effect. The findings show not that Mrs. Paynter remained forcibly, but simply that she did not surrender the premises to the purchasers, and it does not appear that any effort, not even a demand, was made by the purchasers for their property. It was probably too much to expect that she should voluntarily seek them out in advance of any request or movement on their part, and while possibly in ignorance of their whereabouts, and not

impossibly of their very names; and we cannot presume that she committed acts prejudicial to their rights, or such as to create a defense to this action, something in the nature of an equitable estoppel.

It may be that she remained on the property with the tacit assent of the purchasers, or that they were not sufficiently interested in it to take action of any kind to obtain possession; but all this is pure speculation, and the findings, as they stand, compel a presumption of innocent intent upon her part. If she remained forcibly, that fact, might, perhaps, establish a defense, but it is a fact to be proved and not to be inferred.

The same reasoning applies to the conveyance she made to a third party after the sale, and it may, in the lack of other proof, be assumed to be in the nature of a conveyance to remove a cloud upon the title, which she certainly had a right to make, and which was an act in aid of the Government's title to the tax-sale purchasers.

The surplus, under the provisions of the statute, is to be paid to the "owner of the property or his legal representatives." The claimants, at the date of the sale, had title to the property, and unless debarred by some act committed, after the sale, clearly must recover the proceeds. Whatever legal right the tax act could take from them had been taken; whatever title the tax act could pass had vested in the purchasers. The principal object of the act had been accomplished in that the Government had received its due, and considerably more, while to the purchasers the courts were open to obtain possession of their property should it not be surrendered peaceably. The Government did not warrant the title, and had ceased to have any interest or concern in the land, other than a general desire that other sales should not be embarrassed by a known disposition on the

part of the owners to refuse possession to the purchasers.

We cannot assume that the claimant endeavored to defeat this desire by impairing the title intended to be given, and, in fact, this section may involve an acknowledgment on her part perhaps sufficient to estop her, or those holding under her, from an attack hereafter upon that title.

Judgment will be entered in favor of the claimants for $274.51.

The important questions presented to the appellate court for determination and decision may be stated as follows:

(1) How does the retention by Cooper of the real estate described affect his right to recover the surplus proceeds of the direct-tax sale?

(2) How does the sale and conveyance of such real estate by Cooper to a third person for a valuable consideration, regardless of the sale and conveyance thereof by the direct-tax commissioners to Vezin, and subsequent to Cooper's quitclaim to the Government, affect his right to recover the surplus proceeds of such sale for direct taxes?

(3) If Cooper is awarded such surplus proceeds according to the findings of fact, will it not be giving him not only the possession but the value of the land, and also the surplus proceeds?

In the case of *The United States* vs. *Taylor* (14 Otto, 216), the claimant of the surplus proceeds was shown not only to have been the owner of the land at the time it was sold for direct tax, but that he also became the owner of the tax-sale title by purchase, for a valuable consideration from the purchaser's assignee.

In the only other Supreme Court decision, *United States*,

appellant, vs. *Lawton* (110 U. S. Reps., 146), it is set forth that Lawton's mother remained till her death dispossessed of the land by direct-tax sale.

The Court of Claims, in the case of *James M. Rhett* vs. *The United States* (20 C. Cls., 338, 339), said:

> The Statutes never intended that the claimant should be possessed both of the land and its representative, the surplus proceeds. * * *
>
> The right to the money and the ownership by redemption of the land cannot coexist.

In that case the land had been redeemed by the original owner under the statute, but the language of the court is applicable to the case of a party who held possession of the land under his original title, not being dispossessed by the tax sale.

In the Rhett Case the Government was the purchaser. In the case at bar the land was sold to Alfred Vezin. Vezin never got possession of Cooper's land, and consequently received no benefit from the purchase. The sale did not change Cooper's relation to the land. He held it, and finally transferred the title and possession to a third person for a valuable consideration, who must be presumed to retain it as such grantee. If Cooper, individually, held title and possession of the land, would he now be entitled to the surplus without having procured the tax-title certificate? We think not. Then why should he be so entitled because he has sold and conveyed the land to some other person? How can this change his status? Here is a man who has paid nothing in the Treasury by way of taxes; has not purchased the tax certificate from Vezin, nor in any manner indemnified him for his outlay at the

direct-tax sale; has held the possession and received the income from such real estate, and finally, has sold and conveyed the land to a third person for a valuable consideration, which under the facts in the case must be presumed to have been its actual and true value, and now asks to recover a surplus in the Treasury to which he has not added a penny. If he has no claim of his own, to whose claim can he assert subrogation?

To give Cooper the surplus proceeds in this case would be to give him a *bonus* for refusing to discharge his duty as a citizen in the payment of his taxes, and also for having shown his utter contempt and disregard for the law. It will be giving him his land, or, what is the same thing, its presumed actual value—and the surplus placed in the Treasury by some other person. Congress could not have intended such an application of the statute. Common sense, reason, and fair dealing all stand in bold-relief against such a proposition.

By reference to the opinion in the Paynter Case it will be seen that the judgment was rendered for the claimant upon presumptions that we do not think are sound, and in accordance with the findings of fact. Cooper was presumed to know the law. Hence he knew the sale of his land for direct taxes carried the title to the purchaser at the tax sale, and that the certificate of sale was equipollent with a deed, and cast upon the former owners the burden of showing it had not such effect (*De Treville* v. *Smalls*, 98 U. S. R., 521). As the conclusion of law in Cooper's Case has been found in accordance with the rulings in the Paynter Case, upon the same state of facts, we must examine the opinion of the court in the latter case for the

purpose of ascertaining upon what ground such conclusion was reached.

The court say in regard to the possession and sale:

> It may be that she remained on the property with the tacit assent of the purchasers, or that they were not sufficiently interested in it to take action of any kind to obtain possession; but all this is pure speculation, and the findings, as they stand, compel a presumption of innocent intent upon her part. * * *
>
> The same reasoning applies to the conveyance she made to a third party after the sale, and it may, in the lack of other proof, be assumed to be in the nature of a conveyance to remove a cloud upon the title, which she certainly had a right to make, and which was an act in aid of the Government's title to the tax-sale purchasers.

Whatever may be said about the presumption as to the possession, the other presumption is not warranted. How could a cloud upon the title be removed by conveying to some one who had no title? How could this aid the Government purchasers? It is to be regretted the opinion stops short of an explanation. These are groundless presumptions when the facts are considered, and especially so when applied to the case at bar, in which it is found (Finding IV) claimant simply sold the land subject to the tax-title, which precludes the presumption that it was sold for the purpose of removing the cloud of the purchasers for direct taxes.

Do not the findings of fact upon which these presumptions are founded, and the conclusion of law announced, rebut any such presumptions?

Cooper knew the land had been sold for direct taxes; he was presumed to know the law; hence he knew the

title vested, under the direct-tax sale, in the purchaser and holder of the certificate; that such purchaser was constructively, if not actually, in the possession thereof; that when he sold and conveyed the land to a third person, subject to a tax-title, he was selling, for a valuable consideration, what belonged to another; that after he had so sold and conveyed the land to a third person for such valuable consideration, he quit claimed to the United States, upon the pretense of securing them from a second payment of the surplus, when, prior to that time he had divested himself of all interest in such land.

In the light of all these facts "innocence" can hardly be presumed on behalf of Cooper.

The statute provides (sec. 36, 12 Stat. L., 304) that "such surplus shall be deposited in the Treasury of the United States, to be there held for the use of the owner or his legal representatives," until application is made therefor.

Under this provision, when construed in connection with the general statutes upon the subject, can it be said it was the intention of Congress to authorize the payment of this surplus to persons like the appellee, who were never divested of either the possession or title to their land.

It may be said the surplus does not belong to the Government. Granted. Under the circumstances it does belong to the appellee. It is, then, an anomalous surplus for the distribution of which Congress has made no provision. It is a state of things not foreseen by Congress, and not embraced in the legislation upon the subject.

This much we deem sufficient in this case; but the Treasury Department having had the same matter under

consideration we take the liberty of incorporating its ruling and opinion thereon as part of this argument, and it is as follows:

(1) Appropriation of the land by purchasers, one of the conditions precedent to the maintenance of an action for surplus proceeds by the owners.

(2) Appropriation of the land fails when it is withheld by the owner as fully as when redeemed by return of purchase-money under laws relating to redemption. Condition of trust also fails

In *United States* vs. *Lawton* the Supreme Court decides that it differs from the *Taylor Case* (104 U. S., 216) only in that the land in the former case was bought in by the United States.

Section 4, *Act of June* 7, 1862 (12 Stat. L., 422), forfeited each parcel of land in insurrectionary districts to the United States, and, upon its sale, vested it in the purchaser in fee, free, and discharged from all prior liens, encumbrances, right, title, and claim, whatsoever.

The Supreme Court in *De Treeville* vs. *Smalls* (8 Otto, 525) says:

> It was the owner's duty to pay the tax when due. His land was charged with it by the act of Congress, *not by the commissioners*, and the proceeding ending in a sale was simply a mode of compelling the discharge of his duty. All his substantial rights were assured to him by the *permission to show* that he owed no tax; that his land was not taxable; that he had paid it, or redeemed his land after the sale.

The Court of Claims in the case of *Rhett* vs. *United States* says:

> The theory of the Supreme Court in this class of

cases, by which the owner maintains a suit, is that "there is an implied contract on the part of the Government to pay over the surplus proceeds. The obligation arises from the fact that *it has bought and holds lands* once belonging to the claimant; but after the redemption *one of the conditions, to wit, the appropriation of the land by the purchaser* (the United States) has failed.

The defendants (the purchasers) never derived any profit from the sale * * *. When the claimant (the owner) redeemed the land by paying taxes, &c., he did simply what he was bound to do in the first instance, and ought not to be permitted to profit by his negligence and indifference. * * * The obligation, if it exists sufficient to maintain an action, must grow out of the liability imposed on the Government by the statutes, and in the opinion of the court those statutes never intended that the claimants should be possessed both of the land and its representative the surplus proceeds.

Upon precisely the same ground, strengthened by the fact that the owner did not pay the tax and incidents, and withheld the land from the purchaser, who was by the statute entitled to its possession, one of the conditions of the sale, to wit, the appropriation of the land by the purchaser, has failed in the Paynter and Cooper Cases.

The purpose of Congress to first secure the rights of purchasers, and to pay the surplus proceeds *only to owners who actually lose their land by virtue of the direct-tax sales* is evidenced by the very words of the section of the Act of August 5, 1861, on which owners rely for recovering such surplus. Section 36 of that act provides that:

> Owners may redeem their lands sold as aforesaid within two years from the time of sale upon payment

> to the collector, *for the use of the purchaser*, his heirs or assigns, of the amount paid by the purchaser, with interest for the same, at the rate of 20 per cent. per annum; and no deed shall be given in pursuance of such sale until the time of redemption shall have expired. * * *

In ascertaining the legislative purpose as to that part of the section still retained the entire context of the section must be considered; it can make no difference that other portions are repealed by conflicting laws subsequently enacted on the same subject. In this case the rigor of the former act was greatly intensified by the subsequent acts.

The context of the act of July 7, 1862, and all its amendments, shows that the intention of Congress was to compel delinquent owners of land to pay the tax, penalty, &c., by an immediate transfer of the title and possession thereof after its sale.

Under the act of 1861 there was no 50 per cent. penalty added to the tax in case of non-payment, as in the acts relating to insurrectionary districts. These latter acts are all for the purpose of collecting war taxes in States that had refused to make provision for their payment when, as set forth in section 1 of the act of July 7, 1862, "by reason of insurrection or rebellion the civil authority of the United States is obstructed" so that the act of August 5, 1861, "cannot be peaceably executed." Instead of getting a deed after expiration of time allowed for redemption, purchasers, under act of 1862 and amendments, receive forthwith, after the sales, certificates of sale, which are made at once matters of record under the law, and are required to be received in

all courts and places as *prima facie* evidence of the regularity and validity of said sales, and of the title of said purchasers, final possession of the lands being contingent only upon their redemption by the owners as prescribed, or upon the failure of the owners to show in a legal manner that they owed no taxes, or had paid them before the sale. The amendatory act of March 3, 1865, provides for a writ of possession to be issued by the tax commissioners to the marshal of the district, or any fit person, to put purchasers forthwith into possession. This law was made to apply to past as well as future direct-tax sales, and proves that Congress held the United States bound to put purchasers into the possession, which it acquired through its sovereign power, by the instrumentality of its agents, the tax commissioners. Prior to March, 1865, the tax commissioners had performed the same duty without issuing a formal writ. Except in Arkansas, where such writ issued with the certificate of sale at the option of the tax commissioners, it was seldom used, and was deemed superfluous. Much trouble was given by State courts, which had no jurisdiction, over these questions of United States laws, and in the fourth circuit of the Florida State court, in the cases of *Edward N. Dickerson* vs. *Jane Y. Acosta*, and *Soutter and McRae* vs. *Miller*, Judge Archibald, in a written opinion, held that "the war of the rebellion, though ended in the field, was continued in the courts."

Section 7, *Act of March* 3, 1865 (13 Stat. L., 501), provides that *upon redemption the purchaser shall forthwith deliver possession to the owner so redeeming.* Section 15, same act, provides that lands held in severalty may be redeemed by owners paying a proportional part, and the

purchaser may retain the residue of the tract purchased after redemption of a part, and the board of tax commissioners shall issue a new certificate for the piece or parcel of *land retained by the purchaser, &c.*

Section 8, act of 1862, gives judicial authority to the board of tax commissioners, with the right of appeal to the district court of United States for said district. In most cases no United States district court was established over the insurrectionary districts until after the time for redemption before the commissioners had expired, viz, sixty days, one year, and two years respectively. The practice of the commissioners was to turn the owner out of possession unless redemption was promptly tendered, or a satisfactory arrangement was made at once for the purchasers' possession. The first section of the act of March 3, 1865, gave the commissioners a more formal method of proceeding, and sustained their previous practice in the matter of giving possession to purchasers forthwith.

The Supreme Court, Chase, Chief Justice, in the case of *Bennett* vs. *Hunter* (9 Wall., 336), analyzes the provisions of section 4, act of June 7, 1862, and applies to that and all direct-tax cases the rule laid down in the case of *U. S.* vs. *Repentigny* (5 Wall., 265) viz:

> To forfeit land and acquire absolute possession by the United States and its vendees, it is only required to produce a record of some public transaction equivalent to *office found*. The sale was the public act, which is the equivalent to office found. What preceded the sale was merely preliminary; * * * the title indeed, was forfeited by non-payment of the tax, * * * and upon public sale, became actually *vested* in the United States or in any other purchaser.

In this case the court separates the fourth section, act of June 7, 1862, into two clauses:

(1) "That the title of, in, and to each and every piece or parcel of land upon which said tax has not been paid as above provided, shall thereupon become forfeited to the United States."

In considering the question whether this clause worked a transfer to the United States, in its capacity as sovereign, of the land declared to be forfeited, the court further says:

> It seems quite clear that the first clause of the fourth section was not intended by Congress to have the effect attributed to it, independently of the second clause. * * * * *

The second clause reads as follows:

> (2) And upon the sale hereinafter provided for shall vest in the United States, or in the purchasers at such sale, in fee-simple, free and discharged from all prior liens, incumbrances, right, title, and claim whatsoever.

In this case the defendant, Hunter, was the remainder man whose right to the land arose from a tender made of the tax, penalty, &c., before the sale of the land, by a tenant of his father, who was then the owner of a life estate therein. It was contended that the first, or forfeiture, clause of section 4 of itself operated *proprio vigore* to divest the title of Hunter before the sale, and the decision was that to do this *the sale was essential* as provided in the second clause, the effect of which was precluded by a due tender of the tax, penalty, &c.

The language of the second clause of section 4 could not well be made more powerful, when it is considered that the

act is one of sovereign prerogative provided for in the national Constitution, and the condition of the country at the time was that of internecine war. The land is discharged from all prior liens for debt and from every right, title, and claim whatever; and in this free, unincumbered state is passed by the sale to the purchaser *proprio vigore* and absolutely, whether such purchaser be the United States or an individual, subject only to redemption or recovery by the owner making specified proof. All of the three departments of the Government have taken part in the proceedings concerning the sale, which is equivalent to *office found* at common law. The national legislature enacts the law, the executive approves, and the judicial branch construes it—special judicial authority adequate to the objects and purposes of these direct-tax acts is given to the direct-tax commissioners in addition to their executive authority.

The Supreme Court, in *Fairfax* vs. *Hunter* (7 Cranch, 625), Story J., says:

> It seems difficult to contend that the legislature meant to grant mere titles and rights of entry of the Commonwealth (Virginia) to land, in the same manner as it did lands of which the Commonwealth was in actual possession and seizin. It would be selling suits and controversies through the whole country, and enacting a general statute in favor of maintenance, an offense which the common law has denounced with extraordinary severity.
>
> If one be disseized, he may not grant the land or a right of action to recover it. (3 Washburne on Real Property, 303.)

The owner being disseized by the direct-tax sale after forfeiture of the land, under provisions of the law which

execute themselves *proprio vigore*, cannot convey the land to another, and any attempt to do so must be null and void, because of the fact that he has been disseized, and of the lawful seizin of the purchaser by virtue of the sale. The tax-sale certificate is matter of record under the law (Sec. 7, *Act of June* 7, 1862) as amended February 6, 1862 (12 Stat. L., 641; sec. 14, *Act of June* 7, 1862).

Any attempt to hold permanently by the owner after the sale must be a forcible holding in violation of the direct-tax laws, unless he has purchased for a valuable consideration the title of the tax-sale purchaser. Both the title and possession being transferred to the purchaser, the land can only be repossessed by the owner through a trespass on the same, unless he buys it; but, if it can be maintained that the purchaser, by his own laches and failure to demand possession, loses both his purchase-money and the land to which he is lawfully entitled, and the owner holds the land adversely until he or his vendee recover it under the State limitation laws, he certainly can have no claim to the surplus proceeds of the sale after the direct-tax laws have ceased to be operative, and he holds only under State laws. As in the case of *Rhett* vs. *United States*, the obligation to pay over the surplus arises from the fact that the purchaser bought and held land once belonging to the claimant; but one of the conditions, to wit, the appropriation of the land, has failed. The purchaser in the Cooper Case never derived any profit from the sale. The owner is still delinquent; or if he proposes to pay the taxes, it is not with his own money but with that of the purchaser, though he was bound to do it in the first instance, and ought not to be permitted to profit by his neg-

ligence and indifference. Thus, according to the language of the Court of Claims and the law of the case "the direct-tax statutes never intended that the claimants should be possessed both of the land and its representative, the surplus proceeds."

There are two provisos to section 36, act of August 5, 1861, giving owners a right to the surplus proceeds: first, he is allowed to pay the tax, &c., before the sale; and, second, he is allowed to redeem within two years "upon payment to the collector for the use of the purchaser, his heirs, or assigns, of the amount paid by said purchaser, with interest, &c. (Substantially affirmed in § 7, *Act February* 6, 1863, 12 Stat. L., 640.) Thus the section creating a trust in favor of the owner makes it clearly subject to a trust in favor of the purchaser for a return to him of the purchase-money with interest thereon. To further show that under acts relating to the insurrectionary districts Congress never intended that owners should be possessed both of the land and the purchase-money, which includes the surplus proceeds, section 1, act of May 9, 1872, provides that no owner shall be permitted to recover of the purchaser without showing, in addition to the other necessary facts, that all taxes, costs, and penalties due, have been paid by him, the owner, and section 2 of the same act as amended by section 9, act of June 8, 1872, provides for repayment of purchase-money to purchasers who are evicted through failure of title, &c. Section 4, act March 3, 1865, gives loyal lien creditors surplus proceeds (13 Stat. L., 501.)

In the case of Sarah B. Cuthbert (No. 14300), which is similar to the case of Mr. Cooper, as presented to the

Secretary of the Treasury, and rejected by him, the Court of Claims, in its opinion, says:

> The defendants (United States) hold in their Treasury under an implied trust a sum of money which, in the language of the act of August 5, 1861, section 36, is to be held for the use of the owner or his legal representatives. By the term "owner" is necessarily intended every person having an interest in the realty. * * * The court must hold that the action cannot be maintained by the claimant alone.

The implied trust referred to by the court must always arise from the circumstances of cases under the direct-tax laws. The loss of the land by virtue of sales for taxes is the chief condition upon which the trust is founded. Hence if the purchaser loses the land instead of the owner, the implied or resultant trust on the part of the Government must be in favor of the purchaser, as in cases of actual redemption under the terms of the law, or of practical redemption by a judgment in the United States court, or under the provisions of section 4, act of February 25, 1867, and section 3689, Revised Statutes, "To refund to persons money collected from them without warrant of law, &c." The trust resulting from the language of section 36, act of August 5, 1861, in favor of the purchaser is just as plainly implied and as binding as that in favor of the owner, though it has not yet been declared so by the Supreme Court, perhaps for want of a case presented. The trust in behalf of the owners is certainly subject to the purchasers' rights under the same laws. Being so subject to those rights, it cannot inure to the owner or purchaser unless all the conditions from which it arises are fulfilled. The trust will merge upon non-compliance of

both owner and purchaser with the requirements of the direct-tax laws out of which it springs.

If the owner had made application to the Secretary of the Treasury in due form prior to the expiration of the limitation laws of Tennessee the allowance of his claim within seven years would have worked an estoppel against him as to any claim of title to the land under the direct-tax laws, and in favor of the title of the purchaser, his heirs or assigns. Never having performed the requirements of the direct-tax laws so as to bring himself within their provisions during the time they were operative on the title and possession of the land, he cannot now invoke the aid of these laws in securing a premium for disobeying them, after they are no longer operative upon the case.

As to the court's opinion that "the courts were open to obtain possession," in reality, while they, after the war ended in the field, have been considered competent courts, in the insurrectionary districts of Tennessee and some other States, practically they were not open to purchasers except for the uniform rejection of their claims, however well presented. Judgments were always given, for more than ten years after the war ended, in favor of owners, who forcibly, or by trespass, held or regained possession of land sold for direct taxes. The Department has no knowledge of a case in Western Tennessee wherein a denial of all the rights of puachasers was not promptly made, whether presented in State or United States courts. The amounts involved in nearly all of these cases were too small for appeal to the Supreme Court. Under these circumstances, purchasers ought not to be required to waste their money in fruitless litigation any more than owners

should be required to tender direct taxes through agents in Virginia, where a rule of the tax board uniformly denied the right of such agents to pay taxes for owners. In the case of *Tacy* v. *Irwin* (18 Wall., 540) it was ruled that no tender was required, because it could not be availabe; and this in both cases was matter of public notoriety.

The Government substantially warranted the purchaser's title, upon a condition that the owner did not make special proof as permitted by the statute, and it warranted the purchaser's possession forthwith and unconditionally. (Secs. 1, 7, and 15, *Act of March* 3, 1865; sec. 4, *Act February* 25, 1867; *Bennett* vs. *Hunter*, 9 Wall., 336.) The act of 18th January, 1844, chapter 92, section 1, Nich. Sup., 259, provides that—

> All judgments or orders of sale shall be conclusive, unless the person wishing to show irregularity of the same can prove that the taxes were duly paid before such judgment or order of sale was rendered. (*Tharp* vs. *Hart*, 2d Sneed [Tenn.], 569.)
>
> The tax deed is *conclusive evidence* that all things whatsoever required by law to make a good and valid sale, and to vest the title in the purchaser, were done, except three points named, wherein the deed should be *prima facie* evidence only. (*Allen* vs. *Armstrong*, 16 Iowa, 508.)

In citing the two authorities above mentioned the Supreme Court says the latter is *substantially the same* as the direct-tax statutes, which, like those of certain States named, was intended to meet a tendency of judicial refinement in other States that made the collection of money by tax sales practically nugatory. (See *De Treville* vs. *Smalls*.)

In the last paragraph of the opinion the Court of Claims, in referring to a possible estoppel in favor of the purchaser's present right to the land, seems to have made an important omission by not taking into account the seven years' limitation law of Tennessee.

If the views above expressed are correct, or substantially so, it must follow that the court erred in not assuming that the claimant endeavored to defeat the title intended to be given, and also in assuming without proof that the conveyance to a third person was an act in aid of the Government's title to the tax-sale purchasers. The onus is upon the claimants to show that, having lost the land, they purchased the title of the purchasers for a valuable consideration through the agency of such third person acting for the said purchaser.

It is respectfully submitted, therefore, that the judgment of the Court of Claims should be reversed.

A. H. GARLAND,
Attorney-General.
HEBER J. MAY,
Assistant Attorney.

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In the Supreme Court of the United States.

OCTOBER TERM, 1886.

THE UNITED STATES, APPELLANTS,
vs.
JOHN C. COOPER.
No. 1022.

APPEAL FROM THE COURT OF CLAIMS.

ADDITIONAL BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1886.

THE UNITED STATES, APPELLANTS,
vs.
JOHN C. COOPER.
No. 1022.

APPEAL FROM THE COURT OF CLAIMS.

ADDITIONAL BRIEF FOR THE UNITED STATES.

The attention of the Supreme Court is respectfully called to the following matter, received from the Treasury Department, and requested to consider it as an additional brief for the United States, to wit:

TREASURY DEPARTMENT,
January 10th, 1887.

To the honorable the ATTORNEY-GENERAL:

SIR: Referring to the claim of John C. Cooper, for surplus proceeds of a direct-tax sale of land in Tennessee, now pending before the Supreme Court on appeal from the Court of Claims, I have the honor to inclose a decision of this Department approving an allowance of $175.00 to Clarence M. Dowling, sole heir of Michael Dowling, deceased,

who was the purchaser, in 1864, of two lots or parcels of land in Shelby County, Tennessee, under the direct-tax laws.

In this case the Commissioner of Internal Revenue, in transmitting the claim, had raised the point of laches on the part of the claimant from long delay, and suggested to the Secretary the theory upon which statutes of limitation are based as applicable to the claim.

The reasons given for approving the claim for refunding the purchase-money to the heirs of the tax-sale purchaser appear to practically support the position taken by the Department of Justice in the Cooper Case, No. 1022, referred to. (See page 13 of your brief therein.)

The claim of Dowling differs from that of Cooper in this, that in the former case the land was duly redeemed by the owner, while in the latter it was not, and the purchaser has not claimed the purchase-money, though he lost the land, no appropriation being made in favor of purchasers except in cases of redemption of the land.

The ruling to which your attention is invited would seem to fairly show that there still exists an equitable right in purchasers at direct-tax sales to a return of the purchase-money in all cases when they have lost the land by reason of the failure of delinquent owners to deliver possession thereof; and that Congress may be properly called upon to authorize the refunding of the money paid by all such purchasers who have not been already reimbursed. Should this be done in the future, an allowance of the claim of Cooper, so far as the papers show, would be likely to result in the Government paying the money a second time.

Respectfully, yours,

D. MANNING,
Secretary.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
December 30th, 1866.

To the COMMISSIONER OF INTERNAL REVENUE:

SIR: Your letter of the 14th ultimo is received, transmitting the claim of Clarence M. Dowling for the refunding of purchase-money paid by his father, Michael Dowling, as purchaser at a direct-tax sale of land in Shelby County, Tennessee, being lots 12 and 13, Ragland's subdivision, 4½ acres, assessed to E. D. Ragland in 1860, fourteenth civil district (country), sold for $175.00, and struck off to Michael Dowling on June 16th, 1864, tax-sale certificate No. 241.

It appears from the "return money certificate" of the direct-tax commissioners that the whole amount of said purchase-money was paid to the commissioners, and was by them duly forwarded to the Treasury Department, with a duplicate of the certificate of sale; that on November 17th, 1865, Cornelia R. Ragland, wife of E. D. Ragland, redeemed said property, and a certificate of redemption was issued for the same.

It does not appear that the purchase-money was ever returned to Michael Dowling, who died, as it is alleged, on October 4th, 1865, before the land was redeemed, or to any other person.

Section 36, act of August 5, 1861, provided that "owners may redeem their lands, sold as aforesaid, within two years from the time of sale, upon payment *to the collector for the use of the purchaser, his heirs, or assigns, of the amount paid by the purchaser, &c.*"

Section 7, act of June 7, 1862, as amended by act of February 6, 1863, provided for the return of purchase-money by the commissioners of direct tax, upon redemption by the owner; and section 7, act of March 3, 1865, provides for the return of pur-

chase-money by the Secretary of the Treasury when the same is paid into the Treasury.

Section 3689, Revised Statutes, makes permanent annual appropriation for refunding money paid at direct-tax sales for lands redeemed.

Under the decision of the Supreme Court in the *Taylor Case* (104 U. S. R., 216) section 36, act of August 5, 1861, is not repealed by the subsequent statutes, excepting where they come into substantial conflict with it. But, even if repealed, the language of the original direct tax above quoted evidences the intention of Congress to create a trust in favor of purchasers who lose the land sold to them by the Government. The trust on the part of the United States would seem, therefore, to be quite as sacred in favor of purchasers who pay the tax, &c., as that in favor of delinquent tax-payers.

The general theory upon which statutes of limitation are based does not appear to apply in a case like this, where the Government upon which the demand is made is by statute the lawful depository of a record of the facts covering the entire transaction.

Allowance of the claim for the sum of one hundred and seventy-five dollars ($175) is hereby approved upon the condition that the necessary evidence, be filed in the case before payment thereof, that the claimant is the sole heir of the said Michael Dowling, deceased, who paid the money as aforesaid.

The papers are herewith returned.

Respectfully yours,

C. S. FAIRCHILD,
Acting Secretary.

Respectfully submitted.

A. H. GARLAND,
Attorney-General.

HEBER J. MAY,
Assistant-Attorney.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1886.

THE UNITED STATES, APPELLANT,

vs. } No. 1022.

JOHN C. COOPER, APPELLEE.

APPEAL FROM THE COURT OF CLAIMS TO BE SUBMITTED UNDER RULE 20.

BRIEF FOR THE APPELLEE.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1886.

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JOHN C. COOPER, APPELLEE.

APPEAL FROM THE COURT OF CLAIMS TO BE SUBMITTED UNDER RULE 20.

BRIEF FOR THE APPELLEE.

I.

This case rests upon the following mutually admitted facts:

1. That on June 25, 1864, in pursuance of the Act of Congress approved August 5, 1861, and acts amendatory thereof, the Direct Tax Commissioners in Tennessee sold and conveyed two parcels of land situated in the county of Shelby in the State of Tennessee, described as lots twenty-five (25) and thirty-six (36), William Cooper's subdivision, twenty-three (23) acres, assessed to J. C. Cooper 1860, Fourteenth Civil District (country), for direct taxes, to Alfred Vezin for $425.

2. That at the time of the sale, June 25, 1864, John C. Cooper, the appellee, was the owner in fee of the said two parcels of land.

3. The total amount of charges against the said property amounted to $33.55, leaving a balance or surplus of $391.45, which was deposited with the Secretary of the Treasury of the United States, *to be there held for the use of the owner of said lands or his legal representatives.*

4. That the said John C. Cooper, the owner of said land, applied to the Secretary of the Treasury for such proceeds and that payment was refused him.

5. That after said refusal on October 9, 1884, said John C. Cooper filed his petition in the Court of Claims asking judgment for said surplus.

6. That in 1865 the said John C. Cooper sold said land subject to the tax title, and in 1882 he released and quit claimed to the Government, and those claiming under it all his interest in said parcels of land to secure the Government against a second payment of the surplus in question.

And on this state of facts found by the Court of Claims and admitted on both sides, the court gave judgment for the petitioner, this appellee, for the sum claimed, to-wit: $391.45, and the Government appealed.

II.

On the part of the appellant it is maintained that the important questions presented in this case are:

"1. How does the retention by Cooper of the real estate described affect his right to recover the surplus proceeds of the direct tax sale?"

"2. How does the sale and conveyance of such real estate by Cooper to a third person for a valuable consideration, regardless of the sale and conveyance thereof by the Direct Tax Commissioners to Vezin, and subsequent to

Cooper's quit claim to the Government, affect his right to recover the surplus proceeds of such sale for direct taxes?"

"3. If Cooper is awarded such surplus proceeds according to the findings of fact, will it not be giving him not only the possession but the value of the land and also the surplus proceeds?"

But how these questions are to become material in this case we are left to conjecture.

While it might be safe to leave these questions to answer themselves, courtesy suggests that they be noticed.

The findings of fact by the court are at least equal in dignity to the findings of fact by a jury, and assume that, for the purposes of this appeal, the findings of fact by the Court of Claims in this case are conclusive; and from such findings it is apparent that no such condition of things as is assumed by the Government in the foregoing do now or have existed.

But considering these questions *seriatim* it will be seen:

1. The Court of Claims did not find that Cooper retained possession of the land in question or that he was ever in actual corporeal possession of the same, on the contrary it is fairly inferable, as the said parcels of land were unimproved by buildings, and the most reasonable conclusion would be that at and after the tax sale Cooper did not have such possession as would oust or defeat the possession of Vezin under his tax title, if that question can cut any figure in this case. Cooper was under no obligation to force Vezin into possession.

The courts were open to Vezin; he had a maintainable title to the land under the conveyance from the Direct Tax

Commissioners, (Tharp v. Hart, 2 Sneed 569, and other Tennessee cases), and as he has made no demand for the surplus nor any complaint of ouster, it is but rational to assume that his rights have been conserved and his interests protected, and that the Government has no further concern with Vezin, the property, or its occupancy by Cooper or anyone else.

Suppose Cooper did occupy said realty after the tax sale as a tenant of Vezin at will, or under a lease or by the consent of Vezin, there would be nothing in this occupancy to defeat his right to the surplus, nor is the Government, a mere stake holder or trustee, in any position to urge that fact as an answer to appellee's demand for the surplus proceeds arising from the sale of his lands.

Having sold and conveyed the real estate, and collected the direct tax due, the Government has no further interest in the premises; the Government conveyed all the right, title and interest it possessed. Vezin knew what he was buying and has not complained, and the Government ought to be satisfied, and it would be consistent with fair dealing to now pay over to Cooper, the man who was despoiled, the little remnant of his property.

2. Both the Acts of August 5, 1861, and June 7, 1862, provide for the redemption of real estate sold for direct taxes. The right of redemption of real estate is a valid subsisting lien and has a value.

The court found that Cooper sold the land in question in 1865 "subject to the tax title," that is to say, he sold his equity of redemption, the property charged with an incumbrance of $425, besides interest, penalties and costs, and no rational being, familiar with sales of any kind, would

for an instant presume that he secured for property with a title so clouded, any considerable proportion of its value, and yet because he has lost at least $391.45 in the value of his land by such sale, the Government insists upon his losing it a second time by refusing him this surplus. A point is made that the property was sold by Cooper to another than Vezin, but there is no finding of that fact by the Court of Claims. Cooper could not sell this land divested of the cloud on his title, and if he sold it to other than Vezin or his assignee, to perfect the title in him, that fact was susceptible of proof by the Government (as under the laws of Tennessee deeds of conveyance of real estate must be recorded), and as no such proof has been adduced, the conclusion is irresistible that no such proof exists. By the quit claim to the Government Cooper is made to approve the sale by the Direct Tax Commissioners to Vezin, and by his conveyance made in 1865, subject to the tax sale to Vezin or his assignee, forever divests himself of any right in the real estate, and is clearly entitled to the surplus deposited to his use in the Treasury by the Tax Sale Comsioners.

In order to redeem the property in question either Cooper or his assigns would be required to pay, to the holder of the tax title, the $425 paid for the land, with interest, cost and penalties. Suppose Cooper redeemed from Vezin, and remained in possession, and subsequently sold the land, could the Government keep this surplus?

3. Under no circumstances could Cooper be benefited as intimated in the third question. By the sale an incumbrance in the nature of an adverse title is raised upon Cooper's land. This incumbrance can only be removed by pay-

ing the sum of $425, interest, costs and penalty. Cooper could in no way have the possession and the value of the land too.

If he sells the land subject to the tax title he does not get the value of the land, but simply the value of the right which he conveyed, and that has nothing to do with the surplus in question, beyond the fact that his sale, conveyance and transfer must necessarily be made to his prejudice to the extent of this surplus at least.

Cooper has not the land, he has been divested of that, diminished in value to the extent of $425. He has not the value of the land into $391.45 withheld from him by the United States. So that in no sense can it be said that Cooper can get even approximately the value of his lands, and there is nothing in the suggestion that "to give Cooper the surplus proceeds would be to give him a *bonus* for refusing to discharge his duties as a citizen."

If we are to try this case upon presumptions of facts, as it is against law to presume *mala fides* on the part of the citizen, we would be bound to presume that, acting in good faith, Cooper recognized the sale to Vezin by the Tax Commissioners, and that, to perfect that title, seven months later (in 1865) he conveyed to said Vezin or his assignee such title as still reposed in him.

III.

Counsel for appellants adopts, as a part of their argument, the rulings of, and an argument by, the Treasury Department, why this claim should not be paid; and it is but necessary to say that said argument has been fully and completely answered by this honorable court in its decisions

in the cases of the U. S. v. Taylor, and U. S. v. Lawton, referred to, and that if the rulings and practice of the Treasury Department had been more consistent with law, good faith and fair dealing, the courts would not have been troubled with this class of cases.

IV.

By the thirty-sixth section of the Act of Congress, approved August 5, 1861, (unrepealed, U. S. v. Taylor, 104 U. S. 216) it is made the duty of the Collector, on making sale under the law, to *pay over to the owner of the land* or his legal representatives the surplus of the proceeds of the sale, after satisfying the taxes, costs, charges, commissions and penalties, and if he or they cannot be found, or refuse to receive the same, *then such surplus shall be deposited in the Treasury of the United States for the use of the owner or his legal representatives until he or they shall make application therefor.* (12 Stat. at Large 292, 304.)

Immediately it was ascertained the original owner had a right to demand and receive the surplus, and the Tax Collector had no authority to withhold or refuse to pay it to him, and when in obeying the statute the Collector deposited said funds with the Government, the Government took the fund with that right attached to it, and the rights of the owner therein were in no manner divested or changed, and his right to possession depended upon no condition precedent but that of demand.

The surplus of such sale was not paid to the Government, never became the property of the Government; the money was merely deposited in trust for the use of Cooper, the owner of the land, held subject to his demand, and the only relation the Government bears to it is that of naked

trustee or bailee, and it was its duty to deliver the same on the demand of said owner, according to the original trust.

U. S. v. Taylor 104 U. S. R. 216.
U. S. v. Lawton, 110 U. S. R. 146.
Story on Bailment, sec. 61.
2 Black Com. 452.
1 Dane Abridg., ch. 17, Art. 1 and 2.

It is not material to inquire what became of the property after the tax sale, unless the tax sale purchaser was dispossessed by judgment of U. S. Court, or unless the owner redeemed within two years and the purchase money was refunded to the purchaser. In all other cases the owner of the property is the one legally entitled to the surplus.

This case does not come within either of the exceptions, and Cooper is the proper claimant.

GILBERT MOYERS,
Attorney for Appellee.